INDIANA JUDICIAL CENTER

CASE CLIPS

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CRIMINAL LAW ISSUES

JIOSA v. STATE, No. 35S00-9910-CR-619, ___ N.E.2d ___ (Ind. Oct. 2, 2001).
BOEHM, J.

Bruce Jiosa was convicted of molesting his five-year-old daughter. In this direct appeal he contends that the trial court erred when it excluded testimony as a sanction for violation of a pretrial witness separation order. Because we agree that this was reversible error we do not address the other issues Jiosa raises. We reverse and remand for a new trial.

. . . .

The chronological case summary recites that the trial court granted the motions, ordering "that the witnesses in this cause shall remain outside the courtroom and from within the hearing of the evidence in this cause until after such witnesses have testified and have been excused from giving further testimony."

. . . At the conclusion of the first day, a crowd that included Morgan and Jiosa's parents gathered outside the courtroom. Morgan, who had been excluded from the courtroom under the separation order, overheard Jiosa's father shout to Jiosa's mother, who was "very hard of hearing," details of some of the testimony given that day. It is not clear from the record exactly what testimony was conveyed to Morgan. Nor is it clear from which witness or witnesses that testimony might have originated. It is clear that Morgan then sought out the prosecutor and asked her if the father's account of the victim's testimony was accurate. Morgan next approached Jiosa's counsel and told him that she had observed her daughter engaging in behavior by herself that could have caused the symptoms observed by Dr. Hougendobler.

Jiosa attempted to introduce this evidence at trial the next day, but the trial court

excluded any testimony from Morgan as having been tainted by a violation of the separation order. . . .

. . . .

Through no fault of her own, Morgan was in the courthouse hall, where she had every right to be, when she overheard Jiosa's father shouting details of the testimony given in court that day. She realized the victim's physical symptoms were relevant to the case and approached defense counsel with information that, if credited, would offer an alternative explanation for those symptoms. It is not obvious that this incident constituted a violation of the separation order, at least not by Morgan. It appears from the record that Morgan did not seek out information concerning the victim's testimony. Rather, she was innocently put in a position where it became clear to her that she had knowledge that was relevant to the

outcome of the trial. However, there may well have been admonitions to witnesses that do not appear in the record, and the trial judge regarded this conduct as a violation.

Assuming there was a violation, the critical fact is that there is no suggestion Jiosa had anything to do with any violation of the order. Indiana Rule of Evidence 615 was adopted in 1994. It sets out the circumstances in which a separation order is to be given, but it does not address the remedy for a violation. Accordingly, pre-1994 cases are instructive. It has long been held an abuse of discretion to refuse to permit the testimony of a witness due to a violation of a separation of witnesses order if the party seeking to call the witness is without fault in the violation. Thomas v. State, 420 N.E.2d 1216, 1219 (Ind. 1981) . . . . This is a longstanding doctrine. State ex rel. Steigerwald v. Thomas, 111 Ind. 515, 517, 13 N.E. 35, 35-36 (1887) . . .

. . . .

This common law presumption was not changed by the adoption of the Rules of Evidence. . . .

Nor does this presumption eliminate effective tools for enforcement of separation orders. Trial courts may issue contempt citations and permit evidence of witnesses' noncompliance to impeach their credibility. They may exclude witnesses if the party is at fault or the testimony does not directly affect the party's ability to present its case. [Citations omitted.]

. . . .

[T]he Indiana Court of Appeals has stated that counsel preparing witnesses are not to describe the testimony of other witnesses in the face of a separation order. Cf. Lutz, 536 N.E.2d at 529. This Court has not spoken on the issue and we do not need to resolve it today. Even if the most restrictive view of a separation order is the rule under Indiana Rule of Evidence 615, it is clear that Jiosa's attorney might have elicited the relevant information from Morgan without anyone's violating the order. The same is of course true if Indiana ultimately follows a less restrictive rule. Even under the most restrictive view, nothing would prevent Jiosa's counsel from asking Morgan if she knew of any explanation for her daughter's injuries. If so, Morgan would presumably have responded and would have given the excluded evidence. The trial court's handling of the apparently inadvertent encounter with Jiosa's father precluded this possibility. . . .

[T]he dissent asserts that Morgan's volunteering her testimony to Jiosa's attorney shows that she "planned to change her testimony." There is no privilege to the conversation between Morgan and Jiosa's attorney, and the facts the dissent cites would not be protected as the attorney's work product. Morgan's credibility in light of any change or supplement to her testimony is a matter for the jury to resolve. The trial judge is not given discretion to exclude testimony on the ground, however plausible, that he does not find it credible.

We hold that the trial court abused its discretion in excluding Morgan's testimony.

. . . The judgment of the trial court is reversed, . . . [.]

DICKSON and RUCKER, JJ., concurred.

SULLIVAN, J., filed a separate written opinion in which he dissented, and in which SHEPARD, C. J., concurred, in part, as follows:

I respectfully dissent from the Court's conclusion that Jiosa is entitled to a new trial. I do not think that the trial court committed reversible error when it excluded the testimony of the victim's mother, Peggy Morgan, after determining that she had violated an order separating the witnesses. [Footnote omitted.]

. . . The Court holds that despite Morgan's violation, she was entitled to testify because "there is no suggestion that Jiosa had anything to do with any violation of the order." [Citation omitted.]

In my view, mandating the admissibility of testimony in such circumstances, first, is contrary to our evidence rules [footnote omitted] and, second, fails to recognize the trial court's superior position when it comes to balancing fairly the respective interests of the parties. [Footnote omitted.]

. . . .

The Rule's major change from the common law is that trial courts are now required to grant a separation order when a party requests one. This change removes some of the control over separation orders that trial courts enjoyed at common law and places that control with the parties. [Footnote omitted.] Retaining fault as a per se rule conflicts with this change in philosophy. . . .

Put differently, if the trial court cannot exclude the testimony of a witness who violates a separation order unless the party offering the testimony is at fault, that party has absolutely no incentive to assure compliance with the order. . . .

. . . .

GARRETT v. STATE, No. 49A02-0010-CR-659, ___ N.E.2d ___ (Ind. Ct. App. Sept. 28, 2001).

SULLIVAN, J.

Garrett claims that the trial court erred when, over her objection, it instructed the jury regarding voluntary manslaughter and reckless homicide. In her Statement of the Issues, Garrett states it as "Whether a trial court can properly give lesser included offense instructions over objection by the defense." [Citation to Brief omitted.]

Garrett's objection to the reckless homicide instruction, however, was merely that she was not requesting the jury to consider any lesser included offenses. This implies that she was risking an "all or nothing" jury verdict, i.e. murder or acquittal. Her brief, however, asserts that the error in giving the instruction was because her defense was that the child's death was an accidental drowning and that there was no evidentiary dispute with regard to the various elements distinguishing murder from other lesser included offenses. Although one might discern from this that her right to an "all or nothing" verdict necessarily follows, she does not argue nor cite authority which would undermine the State's ability to give the jury alternatives to an "all or nothing" verdict, even over defendant's objection.

In any event, albeit without discussion as to which party is seeking the instruction, instructions upon lesser included offenses given over defendant's objection have been approved by our Supreme Court and by this court. See e.g., Wilkins v. State, 716 N.E.2d 955 (Ind. 1999); Porter v. State, 671 N.E.2d 152 (Ind. Ct. App. 1996), trans. denied.

Those two cases did not discuss the issue in terms of whether the instruction was sought and refused by the defendant as opposed to given over the objection of the defendant. Both cases rely upon Wright v. State, 658 N.E.2d 563 (Ind. 1995) as the test for when a lesser included offense instruction is appropriate, if not required. In Wright, the

defendant was charged with murder. In response to a jury inquiry during their deliberations, as to whether they might convict of reckless homicide, the jury was advised with regard to the offense of reckless homicide, as well as other offenses, i.e., voluntary manslaughter, involuntary manslaughter, and battery. Defendant did not object to this advisement. See Wright v. State, 643 N.E.2d 417, 420 (Ind. Ct. App. 1994) (Garrard J., dissenting). He was convicted of reckless homicide.

Be that as it may, by focusing upon the circumstances under which lesser included offense instructions may be or should be given, Wright strongly implies that the judicial determination as to whether to give such instructions does not depend upon which party tenders them and whether or not the other party poses an objection.

. . . .

FRIEDLANDER and RILEY, JJ., concurred.

CIVIL LAW ISSUE

FELSHER v. STATE, NO. 82S04-0008-CV-477, ___ N.E.2d ___ (Ind. Oct. 1, 2001).
SHEPARD, C. J.

We . . . address protection afforded to corporations and individuals against unauthorized and retaliatory use of private or personal names on the Internet.

. . . The University of Evansville is a not-for-profit corporation, originally founded at Moores Hill, Indiana, in 1854. [Footnote omitted.] Felsher was formerly a professor of French. The University terminated him in 1991.

In 1997, Felsher created Internet websites and electronic mail accounts containing portions of the names of Dr. James S. Vinson, President of the University; Dr. Stephen G. Greiner, Vice President for Academic Affairs; and Dr. Larry W. Colter, Dean of the College of Arts and Sciences. [Footnote omitted.] Each of these addresses also contained the letters UE, which is a common abbreviation for the University of Evansville.

Felsher featured articles that he had written on the websites he created. The articles alleged wrongdoings by Vinson and other University employees. . . .

. . . .

The University, Vinson, Greiner and Colter filed this lawsuit alleging invasion of privacy, ...

The court denied Felsher's motion to remove the University as a plaintiff. The trial court ultimately granted summary judgment in favor of the University and its officials, concluding that they have "a protectable privacy interest in their rights to the exclusive use of their identities . . . ."

. . . .

The Court of Appeals affirmed. Felsher v. Univ. of Evansville, 727 N.E.2d 783 (Ind. Ct. App. 2000). We grant Felsher's petition to transfer.

. . . .

Felsher asserts that the right to privacy has an "intensely personal nature" and therefore applies to real persons and not to corporations. [Citation to Brief omitted.]

Representatives of several news organizations, as amici curiae, support Felsher's petition to transfer stating, "[W]ell established privacy law . . . precludes corporations from bringing an action for invasion of privacy." [Citation to Brief omitted.] [Footnote omitted.] Amici accurately assert that no other state has recognized a claim for invasion of privacy by

a corporation. [Citation to Brief omitted.]

. . . .

This Court has previously observed that the term "invasion of privacy" is a label used to describe "four distinct injuries: (1) intrusion upon seclusion, (2) appropriation of [name or] likeness, (3) public disclosure of private facts, and (4) false-light publicity." Doe v. Methodist Hosp., 690 N.E.2d 681, 684 (Ind. 1997)(citing Restatement (Second) of Torts, § 652 A (1977)). . . .

. . . We indicated that "recognizing one branch of the privacy tort does not entail recognizing all four." Id. at 685. Our discussion of this history and the Second Restatement served as a prelude to our decision not to recognize a branch of the tort involving the public disclosure of private facts. [Citation omitted.]

The only injury at issue here is appropriation. [Footnote omitted.] The University argues that it may maintain an action for appropriation because the claim addresses a property interest rather than personal feelings. [Citation to Brief omitted.] . . .

While we agree that an appropriation claim involves a privacy issue "in the nature of a property right," we think the University's reliance on the exception set forth in the Restatement is misplaced. Each of the comments to Restatement § 652I negates the inference that a corporation is entitled to an appropriation claim.

. . . .

Finally, the third comment declares, without exception, "A corporation, partnership or unincorporated association has no personal right of privacy." [Citation omitted.] The comment then states that a corporation has "no cause of action for any of the four forms of invasion covered by §§ 652B to 652E." [Citation omitted.] . . .

. . . .

Although the Second Restatement suggests that unique circumstances may "give rise to the expansion of the four forms of tort liability for invasion of privacy," Restatement (Second) of Torts, § 652A cmt. c (1977), we decline to do so today. Instead, we explore the nature of relevant Internet activities and look to business law for protection against the misappropriation of a corporation's name.

. . . .

"Cybersquatters" are individuals who register domain names that are well known, not to use the addresses, but to re-sell them at a profit. For example, the domain name "wallstreet.com" was sold for $1 million. Cybersquatters who register previously trademarked names rarely prevail in litigation between the squatter and the holder of the trademark. [Footnote omitted.]

Unlike cybersquatters, "copycats" register a domain name and use the address to operate a website that intentionally misleads users into believing they are doing business with someone else. Copycats either beat the legitimate organization to a domain name or register a close variation of an organization's domain name. . . .

Copycat domain name use is "intentionally inimical to the trademark owner." . . .

. . . Felsher's actions seem to fall in this second category of cyberpredators. He created the imposter websites and e-mail addresses for the sole purpose of harming the reputation of the University and its officials.

Thus, it might seem appropriate to grant the University the relief gained by the plaintiffs in Planned Parenthood and Jews for Jesus. These plaintiff organizations, however, based their claims on provisions of the Lanham Trade-Mark Act, 15 U.S.C. §§ 1114, 1125(a), (c) (trademark infringement, trademark dilution, unfair competition and false designation of origin). [Citations omitted.]

These trademark actions require commercial use of the domain name. [Citation omitted.] Courts have held, "The mere registration of a domain name, without more, is not

a 'commercial use' of a trademark." [Citation omitted.] The Lanham Act does not include claims for non-commercial use of a trademark in order to "prevent courts from enjoining constitutionally protected speech." [Citation omitted.]

In any event, the plaintiffs here do not assert a right to relief under the Lanham Act, so we need not debate whether the "commercial use" requirement for trademark actions is satisfied by domain name registration and corresponding presentation of information on a website.

. . . Amici curiae argue that an appropriate remedy for the misappropriation of a corporation name or likeness is found under the state unfair competition law and trademark statutes, as well as common law torts unrelated to notions of privacy, such as tortious

interference with business relations. [Footnote omitted.] [Citation to Brief omitted.] We agree.

. . . .

The trial court based its decision to grant injunctive relief on its finding that Felsher composed and sent e-mail messages purposefully appearing to have been authored by either Vinson or Colter. [Citation to Record omitted.] Felsher used the e-mail to nominate Greiner and Colter for employment and refer recipients of the mail to contrived web sites containing resumes of each nominee. [Citation to Record omitted.] The court also found that the recipients of the e-mail mistakenly believed that the messages were sent by Vinson or Colter. [Citation to Record omitted.] . . .

. . . .

The trial court's findings and the reasonable inferences that they provide confirm that the trial court acted within its discretion when it enjoined Felsher.

. . . .

We affirm the trial court's injunction on behalf of the three University officers, and other individuals, with the modest modification just mentioned.

Concluding that the University itself has no claim in the nature of common law privacy, we reverse that portion of the injunction relating to the institution, noting that it may be entitled to similar relief under other law not so far pleaded.

BOEHM, DICKSON, RUCKER, and SULLIVAN, JJ., concurred.

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CASE CLIPS TRANSFER TABLE

October 5, 2001

This table lists recent grants of transfer by the Indiana Supreme Court for published decisions of the Court of Appeals. It includes Judicial Center summaries of the opinions of the Court of Appeals vacated by the transfers and of the Supreme Court's opinions on transfer.

A CASE CLIPS transfer information feature was suggested by the Justices of the Indiana Supreme Court in response to trial court requests for more accessible information about grants of transfer. The table is prepared with assistance from the Supreme Court Administrator's Office, which sends the Judicial Center a weekly list of transfer grants.

A grant of transfer vacates the opinion of the Court of Appeals: "[i]f transfer be granted, the judgment and opinion or memorandum decision of the Court of Appeals shall thereupon be vacated and held for naught, except as to any portion thereof which is expressly adopted and incorporated by reference by the Supreme Court, and further, except where summarily affirmed by the Supreme Court." Indiana Appellate Rule 11(B)(3).

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
Owens Corning Fiberglass v. Cobb	714 N.E.2d 295 49A04-9801-CV-46	Defense should have received summary judgment as plaintiff showed only that he might have been exposed to its asbestos	1-19-00	9-10-01. 49S04-0004-CV-00035. There was enough evidence of exposure to send case to jury. Trial court erred in excluding evidence a "nonparty" may have been at fault.
Felsher v. City of Evansville	727 N.E.2d 783 82A04-9910-CV-455	University was entitled to bring claim for invasion of privacy; professor properly enjoined from appropriating "likenesses" of university and officials; professor's actions and behavior did not eliminate need for injunction; and injunction was not overbroad..	8-15-00	10-01-01. 82S04-0008-CV-477. No invasion of privacy action for University, a corporation, but other actions may be available. Injunctions properly issued.
South Gibson School Board v. Sollman	728 N.E.2d 909 26A01-9906-CV-222	Denying student credit for all course-work he performed in the semester in which he was expelled was arbitrary and capricious; summer school is not included within the period of expulsion which may be imposed for conduct occurring in the first semester	9-14-00	
Moberly v. Day	730 N.E.2d 768 07A01-9906-CV-216	Fact issue as to whether son-in-law was employee or independent contractor precluded a summary judgment declaring no liability under respondeat superior theory; and Comparative Fault has abrogated fellow servant doctrine.	10-24-00	

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
Shambaugh and Koorsen v. Carlisle	730 N.E.2d 796 02A03-9908-CV-325	Elevator passenger who was injured when elevator stopped and reversed directions after receiving false fire alarm signal brought negligence action against contractors that installed electrical wiring and fire alarm system in building. Held: contractors did not have control of elevator at time of accident and thus could not be held liable under doctrine of res ipsa loquitur.	10-24-00	
S.T. v. State	733 N.E.2d 937 20A03-9912-JV-480	No ineffective assistance when (1) defense counsel failed to move to exclude two police witnesses due to state's failure to file witness list in compliance with local rule and (2) failed to show cause for defense failure to file its witness list under local rule with result that both defense witnesses were excluded on state's motion	10-24-00	
Tincher v. Davidson	731 N.E.2d 485 49A05-9912-CV-534	Affirms mistrial based on jury's failures to make comparative fault damage calculations correctly	11-22-00	
Brown v. Branch	733 N.E.2d 17 07A04-9907-CV-339	Oral promise to give house to girlfriend if she moved back not within the statute of frauds.	11-22-00	
New Castle Lodge v. St. Board of Tx. Comm.	733 N.E.2d 36 49T10-9701-TA-113	Fraternal organization which owned lodge building was entitled to partial property tax exemption	11-22-00	
Reeder v. Harper	732 N.E.2d 1246 49A05-9909-CV-416	When filed, expert's affidavit sufficed to avoid summary judgment but affiant's death after the filing made his affidavit inadmissible and hence summary judgment properly granted.	1-11-01	
Holley v. Childress	730 N.E.2d 743 67A05-9905-JV-321	Facts did not suffice to overcome presumption non-custodial parent was fit so that temporary guardianship for deceased custodial parent's new spouse was error.	1-11-01	
Cannon v. Cannon	729 N.E.2d 1043 49A05-9908-CV-366	Affirms decision to deny maintenance for spouse with ailments but who generated income with garage sales	1-11-01	

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
Davidson v. State	735 N.E.2d 325 22A01-0004-PC-116	Ineffective assistance for counsel not to have demanded mandatory severance of charges of "same or similar character" when failure to do so resulted in court's having discretion to order consecutive sentences.	1-17-01	
Leshore v. State	739 N.E.2d 1075 02A03-0007-CR-234	(1) Writ of body attachment on which police detained defendant was invalid on its face for failure to include bail or escrow amount, and (2) defendant's flight from detention under the writ did not amount to escape.	1-29-01	9-13-01. 02D04-9903-CF-133. Person restrained in cuffs under body attachment is "lawfully detained" under escape statute, even if writ later found defective.
Mercantile Nat'l Bank v. First Builders	732 N.E.2d 1287 45A03-9904-CV-132	materialman's notice to owner of intent to hold personally liable for material furnished contractor, IC 32-8-3-9, sufficed even though it was filed after summary judgment had been requested but not yet entered on initial complaint for mechanic's lien foreclosure	2-9-01	
State Farm Fire & Casualty v. T.B.	728 N.E.2d 919 53A01-9908-CV-266	(1) insurer acted at its own peril in electing not to defend under reservation of rights or seek declaratory judgment that it had no duty to defend; (2) insurer was collaterally estopped from asserting defense of childcare exclusion that was addressed in consent judgment; (3) exception to child care exclusion applied in any event; and (4) insurer's liability was limited to $300,000 plus post-judgment interest on entire amount of judgment until payment of its limits.	2-9-01	
Merritt v. Evansville Vanderburgh School Corp	735 N.E.2d 269 82A01-912-CV-421	error to refuse to excuse for cause two venire persons employed by defendant even though they asserted they could nonetheless be impartial and attentive	2-9-01	

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
IDEM v. RLG, Inc	735 N.E.2d 290 27A02-9909-CV-646	the weight of authority requires some evidence of knowledge, action, or inaction by a corporate officer before personal liability for public health law violations may be imposed. Personal liability may not be imposed based solely upon a corporate officer's title.	2-9-01	9-24-01. No. 27S02-0102-CV-101. Even if piercing the veil doctrine does not apply, civil liability for corporate environmental violations may be imposed on individuals under the "responsible cororate officer doctrine" codified in Indiana environmental statutes.
State v. Gerschoffer	738 N.E.2d 713 72A05-0003-CR0116	Sobriety checkpoint searches are prohibited by Indiana Constitution.	2-14-01	
Healthscript, Inc. v. State	724 N.E.2d 265, *rhrg.* 740 N.E.2d 562 49A05-9908-CR-370	Medicare fraud crimes do not include violations of state administrative regulations.	2-14-01	
Vadas v. Vadas	728 N.E.2d 250 45A04-9901-CV-18	Husband's father, whom wife sought to join, was never served (wife gave husband's attorney motion to join father) but is held to have submitted to divorce court's jurisdiction by appearing as witness; since father was joined, does not reach dispute in cases whether property titled to third parties not joined may be in the marital estate.	3-1-01	
N.D.F. v. State	735 N.E.2d 321 No. 49A02-0003-JV-164	Juvenile determinate sentencing statute was intended to incorporate adult habitual criminal offender sequential requirements for the two "prior unrelated delinquency adjudications"; thus finding of two prior adjudications, without finding or evidence of habitual offender-type sequence, was error	3-2-01	
Robertson v. State	740 N.E.2d 574 49A02-0006-CR-383	Hallway outside defendant's apartment was part of his "dwelling" for purposes of handgun license statute.	3-9-01	
Bradley v. City of New Castle	730 N.E.2d 771 33A01-9807-CV-281	Extent of changes to plan made in proceeding for remonstrance to annexation violated annexation fiscal plan requirement.	4-6-01	

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
King v. Northeast Security	732 N.E.2d 824 49A02-9907-CV-498	School had common law duty to protect student from criminal violence in its parking lot; security company with parking lot contract not liable to student under third party beneficiary rationale.	4-6-01	
State v. Hammond	737 N.E.2d 425 41A04-0003-PC-126	Amendment of driving while suspended statute to require "validly" suspended license is properly applied to offense committed prior to amendment, which made "ameliorative" change to substantive crime intended to avoid supreme court's construction of statute as in effect of time of offense.	4-6-01	
Dewitt v. State	739 N.E.2d 189	Trial court's failure to advise a defendant of his *Boykin* rights (trial by jury, confrontation, and privilege against self-incrimination) requires vacation of his guilty plea	4-26-01	9-13-01. 45S04-0104-PC-221. Record indicates proper advice and knowing plea.
Buchanan v. State	742 N.E.2d 1018 18A04-0004-CR-167	Admission of pornographic material picturing children taken from child-molesting defendant's home was error under Ev. Rule 404(b).	5-10-01	
McCary v. State	739 N.E.2d 193 49A02-0004-PC-226	Failure to interview policeman/probable-cause-affiant, when interview would have produced exculpatory evidence, was ineffective assistance of trial. Counsel on direct appeal was ineffective for noting issue but failing to make record of it via p.c. proceeding while raising ineffective assistance in other respects. Post-conviction court erred in holding res judicata applied under *Woods v. State* holding handed down after direct appeal..	5-10-01	
Equicor Development, Inc. v. Westfield-Washington Township Plan Comm.	732 N.E.2d 215 No. 29A02-9909-CV-661	Plan Commission denial of subdivision approval was arbitrary and capricious, notwithstanding it was supported by evidence, due to Commission's prior approvals of numerous subdivision having same defect.	5-10-01	
Martin v. State	744 N.E.2d 574 No 45A05-0009-PC-379	Finds ineffective assistance of appellate counsel for waiving issue of supplemental instruction given during deliberations on accomplice liability.	6-14-01	

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
Catt v. Board of Comm'rs of Knox County	736 N.E.2d 341 (Ind. Ct. App. 2000) No. 42A01-9911-CV-396	County had duty of reasonable care to public to keep road in safe condition, and County's knowledge of repeated washs-outs of culvert and its continued failure to repair meant that wash-out due to rain was not a "temporary condition" giving County immunity.	6-14-01	
Ind. Dep't of Environmental Mgt. v. Bourbon Mini Mart, Inc.	741 N.E.2d 361 No. 50A03-9912-CV-476	(1) third-party plaintiffs were collaterally estopped from pursuing indemnity claim against automobile dealership; (2) third-party plaintiffs were collaterally estopped from pursuing indemnity claim against gasoline supplier pursuant to pre-amended version of state Underground Storage Tank (UST) laws; (3) amendment to state UST laws, which eliminated requirement that party seeking contribution toward remediation be faultless in causing leak, did not apply retroactively so as to allow contribution for response costs that were incurred before its effective date; and (4) third-party plaintiffs' action against gasoline supplier to recover ongoing remediation costs was not time barred.	6-14-01	
In re Ordinance No. X-03-96	744 N.E.2d 996 02A05-0002-CV-77	Annexation fiscal plan must have noncapital services estimates from a year after annexation and capital improvement estimates from three years after annexation.	7-18-01	
Corr v. Schultz	743 N.E.2d 1194 71A03-0006-CV-216	Construes uninsured motorist statutes to require comparison of what negligent party's insurer actually pays out with amount of insured's uninsured coverage; rejects prior Court of Appeals decision, *Sanders*, 644 N.E.2d 884, that uninsured statutes use comparison of negligent party's liability limits to uninsured coverage limit ("policy limits to policy limits" comparison); notes that not-for-publication decision from same accident, *Corr v. American Family Insurance*, used *Sanders* to hold that the correct analysis was to "compare the $600,000 per accident bodily injury liability limit under the two policies covering Balderas [negligent driver] to the $600,000 per accident underinsured motor vehicle limit of the policies under which Janel [Corr] was an insured; transfer also granted 7-18-01 in this unreported *Corr* case.	7-18-01	

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
Buckalew v. Buckalew	744 N.E.2d 504 34A05-0004-CV-174	Interprets local rule "no final hearing may be scheduled and no decree of dissolution of marriage or legal separation shall be entered unless and until the prescribed [financial] disclosure form is filed" to be "jurisdictional" so that trial court which made the rule had no authority to conduct a hearing or enter a decree without the required disclosure forms or a waiver by both parties.	7-18-01	9-07-01. 754 N.E.2d 896. 34S05-0107-CV-332. Local Rule not "jurisdictional" nor did non-compliance require vacating divorce decree.
Friedline v. Shelby Insurance Co.	739 N.E.2d 178 71A03-0004-CV-132	Applies Indiana Supreme Court cases finding ambiguity in liability policies' exclusions for "sudden and accidental" and "pollutant" as applied to gasoline to hold that "pollutants" exclusion as applied to carpet installation substances was ambiguous and that insurance company's refusal to defend, made with knowledge of these Supreme Court ambiguity decisions, was in bad faith.	7-18-01	
St. Vincent Hospital v. Steele	742 N.E.2d 1029 34A02-0005-CV-294	IC 22-2-5-2 Wage Payment Statute requires not only payment of wages at the usual frequency (e.g., each week, etc.) but also in the correct amount, so Hospital which relied on federal legislation and federal regulatory interpretation for its refusal to pay physician contract compensation amount was liable for attorney fees and liquidated damages under Statute.	7-18-01	
Smith v. State	748 N.E.2d 895 29A02-00100PC-640	Error to find PCR laches when petition was filed within 27 days of sentencing and all ensuing delays due to Public Defender; guilty plea to six theft counts, for stealing a single checkbook containing the six checks, was unintelligent due to counsel's failure to advise of "single larceny" rule; the theft of the checkbook and ensuing deposits of six forged checks at six different branches of the same bank in the same county "within a matter of hours" were a "single episode of criminal conduct" subject to limits on consecutive sentencing and counsel's failure to discuss the single episode limit also rendered plea unintelligent.	7-19-01	
Martin v. State	748 N.E.2d 428 03A01-0012-PC-412	Holds that no credit for time served is earned by one on probation as a condition of probation, distinguishing *Dishroon v. State* noting 2001 amendment providing for such credit is inapplicable.	8-10-01	
State Bd. of Tax Comm'rs v. Garcia	743 N.E.2d 817 (Tax Ct. 2001) 71T10-9809-TA-104	Calculation by which Grade A-6 assessment was reached was not supported by regulations and hence was arbitrary and capricious. Swimming pool assessment as "A" rather than "G" was likewise outside regulations and reversed.	8-13-01	

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
Dunson v. Dunson	744 N.E.2d 960 (Ind. Ct. App. 2001) 34A02-0006-CV-375	Construes emancipation statute to require only that child not be under the care or control of either parent without any requirement he also be able to support himself without parental assistance.	8-13-01	
D'Paffo v. State	749 N.E.2d 1235 (Ind. Ct. App. 2001) 28A004-0010-CR-442	Child molesting instruction's omission of element of intent to gratify sexual desires when touching was fundamental error, not waived by failure of appellant to object, notwithstanding defense that victim was never touched at all. When witnesses had been cross-examined and given chances to explain prior inconsistent statements, the statements themselves were properly excluded as impeachment, Evidence Rule 613.	8-24-01	
Farley Neighborhood Association v. Town of Speedway	747 N.E.2d 1132 49S02-0101-CR-43	Continuation of 45-year-old 50% surcharge on sewage service to customers outside municipality was arbitrary, irrational, and discriminatory..	9-20-01	
Neher v. Hobbs	752 N.E.2d 48 92A04-0008-CV-316	Trial judge erred in requiring new trial when jury found defendant negligent but awarded $ 0 damages, as jury clearly found injury was preexisting.	9-6-01	
Hall Drive Ins, Hall's Guesthouse v. City of Fort Wayne	747 N.E.2d 638 02A04-0005-CV-219	Restaurant was subject to exception to City's anti-smoking ordinance.	9-20-01	
Hall Drive Ins, Triangle Park v. City of Fort Wayne	747 N.E.2d 643 02A03-0005-CV-189	Companion case to *Hall Drive Ins, Hall's Guesthouse v. City of Fort Wayne*, above	9-20-01	
Ind. Dep't of Revenue v. Deaton	738 N.E.2d 695 73A01-0002-CV-49	State income tax warrant's filing with county clerk does not create a judgment for proceedings supplemental.		9-26-01. No. 73S01-0104-CV-207. Tax judgment lien may be collected through proceedings supplemental without first filing suit and obtaining a judgment of foreclosure.